

1

2

3

4

5

6

7

8

9

10

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

11

12

13

UNITED STATES OF AMERICA,

14

Plaintiff,

15

v.

16

CHARLES EDWARD GENSEMER,

17

Defendant.

18

Case No. CR-S-2:07-CR-00145-KJD-PAL

ORDER

19

Before the Court is Defendants Michael Wayne Yost, Charles Gensem, James Milton Wallis, Robert Young, and Kenneth Russell Krum's Amended Motion for New Trial (#1355). The Government has filed an opposition (#1362) and Defendants filed a reply (#1365).

20

I. Background

21

Defendants were convicted by a federal jury on July 6, 2009. The jury found the Defendants were associated with the Aryan Warriors gang and were guilty on drug, assault, and racketeering conspiracy charges. Defendants filed this Motion on August 19, 2011, seeking a new trial based on

22

23

24

25

26

1 newly discovered evidence. Specifically, Defendants claim that Las Vegas Metropolitan Police
 2 Officer Brian Yant has since been shown to be a non-credible witness, that Nevada Department of
 3 Corrections Investigator William Reubart was addicted to prescription painkillers at the time he
 4 testified, and that a letter written by John Neff and used by the Government as evidence, “was
 5 patently false and fraudulent.”

6 II. Discussion

7 Rule 33 of the Federal Rules of Criminal Procedure provides “upon defendant’s motion the
 8 court may vacate any judgment and grant a new trial if the interest of justice so requires.” In
 9 deciding a Rule 33 motion, a trial court has broad discretion. In United States v. Harrington, 410
 10 F.3d 598, 601 (9th Cir. 2005), the Ninth Circuit set forth five factors that must be satisfied by a party
 11 seeking a new trial upon the basis of newly discovered evidence pursuant to Fed. R. Crim. P. 33(a).
 12 The party must show “(1) the evidence is newly discovered; (2) the defendant was diligent in seeking
 13 the evidence; (3) the evidence is material to the issues at trial; (4) the evidence is not (a) cumulative
 14 or (b) merely impeaching; and (5) the evidence indicates the defendant would probably be acquitted
 15 in a new trial.” Id. (citing United States v. Kulczyk, 931 F.2d 542, 548 (9th Cir. 1991)). In rare cases,
 16 newly discovered impeachment evidence can merit a new trial if it (1) “so powerful that, if it were
 17 believed by the trier of fact, it could render the witness’ testimony totally incredible,” and (2) that
 18 “witness’ testimony [was] uncorroborated and provided the only evidence of an essential element of
 19 the government case.” U.S. v. Davis, 960 F.2d 820, 825 (9th Cir. 1992).

20 A. Officer Yant’s Testimony

21 Defendants make a vague and unspecified claim that Officer Yant perjured himself during
 22 trial based on Defendants’ conclusory assertion of Yant’s supposed inclination “to falsify facts in
 23 affidavits for search warrants and to conduct investigations – he is known to lie, mislead, and even
 24 kill in order to protect an illegal investigation or search.” (Motion at 3.) Defendants fail to point to
 25 any specific facts showing that Officer Yant was untruthful in connection with this matter. Officer
 26 Yant gave information to FBI Task Force Officer Michael Quick about Yant’s traffic stop of Kory

1 Krossman as a portion of the basis for a search warrant Quick obtained for a residence where
 2 evidence was recovered. At trial, Defendants fully cross-examined Yant about the information he
 3 gave Officer Quick. Officer Yant's testimony about the association of the Defendants was supported
 4 by other witnesses and evidence. Defendants' accusations about Yant's, if true, would merely
 5 impeach Officer Yant. Such impeachment is an insufficient basis for a new trial. Harrington, 410
 6 F.3d at 601.

7 Defendants rely on Mesarosh v. United States, 352 U.S. 1 (1956) to argue that this supposed
 8 new evidence does not merely impeach Officer Yant, but shows a “‘poisoning of the reservoir’ which
 9 affected the reliability of the verdict in this case.” (Reply at 2.) However, the Court in Mesarosh
 10 made it very clear that a motion for a new trial “initiated by the defense, under Rule 33 of the Federal
 11 Rules of Criminal Procedure,” asserting that a government witness had lied, “ordinarily will not
 12 support a motion for a new trial” Mesarosh, 352 U.S. at 9. In that case, the government, not the
 13 defendant, raised the issue.

14 Defendants further argue that they are entitled to Officer Yant's personnel file pursuant to
 15 Brady v. Maryland, 373 U.S. 83 (1963). Defendants cite no facts or authority showing that they
 16 should be given his file at this time.¹ The Government reviewed Officer Yant's file prior to trial and
 17 would have provided any impeachment evidence to counsel for the Defendants at that time.
 18 Defendants have made no showing that the outcome of the trial would probably be different if their
 19 alleged newly discovered evidence about Officer Yant was presented before the jury. Accordingly,
 20 Defendants have failed to show that they are entitled to a new trial based on newly discovered
 21 evidence about Officer Yant.

22
 23
 24
 25 ¹ Defendants also claim that the Government has acknowledged that Officer Yant “was dismissed from the Las
 26 Vegas Metropolitan Police Force for filing of false affidavits in multiple cases.” (Reply at 2.) The Government made no
 such acknowledgment.

1 B. Agent Reubart's Testimony

2 Defendants argue that Agent Reubart, who testified in the Government's case in chief and
3 rebuttal, was addicted to prescription painkillers. According to Defendants, this addiction may have
4 "affected his testimony during trial." (Motion at 12.) Specifically, Defendants argue that if
5 Ruebart's alleged drug habit had been brought up at trial, the jury "would have decided differently in
6 determining the credibility of [Reubart's] testimony regarding ownership of a storage trailer falsely
7 alleged to have been connected to Gensemer." (Id. at 12.) The only evidence Defendants provide of
8 drug use by Agent Reubart is an unsigned and unfiled criminal complaint.

9 New evidence about prescription drug abuse by Agent Reubart would be merely impeaching
10 and is not a basis for a new trial. Further, the only evidence cited by Defendants is Officer Ruebart's
11 rebuttal testimony about ownership of the storage unit. This testimony would not be susceptible to
12 impeachment since it was focused on a certified business record showing that Jessica Gonzales,
13 Defendant Gensemer's girlfriend, rented the storage unit in question. Evidence at the storage unit
14 connected to Gensemer included a methamphetamine lab and firearms. There is no indication that
15 Gensemer would be acquitted had the rebuttal evidence of Agent Ruebart been impeached.
16 Defendants have failed to show that a new trial is warranted based on alleged new evidence of drug
17 use by Agent Ruebart.

18 C. John Neff Letter

19 Defendants claim that much of the Government's case demonstrating an organizational
20 structure of the Aryan Warriors is based on correspondence and other writings including a letter
21 allegedly written by John Neff (the "Neff Letter"). Defendants claim that many of these letters were
22 admitted by self-authentication or on the basis that agents had "debriefed" the author of the particular
23 letter to discuss the contents. Attached to the Motion is an affidavit by John Neff stating that he did
24 not write the Neff Letter (#AW302500000397) and that he did not discuss this document with any of
25
26

1 the Government's witnesses.² Defendants claim that the Neff Letter was admitted as evidence and
 2 presented to the jury "to support the Government's claim of a criminal organization." (Motion at 11.)

3 Contrary to the assertion of Defendants, the Government never discussed or elicited
 4 testimony regarding the Neff Letter, the contents of the Neff Letter or the fact that Neff was allegedly
 5 debriefed. The Neff Letter itself was not introduced into evidence and the claim that Neff was
 6 debriefed was put forth by defense counsel in cross examination, and not part of the Government's
 7 case. Furthermore, the Neff Letter is not newly discovered evidence. The Government disclosed the
 8 letter during discovery and Defendants could have spoken to Neff prior to trial. There is no
 9 indication that Neff's testimony about the Neff Letter would probably result in Defendants being
 10 acquitted on any charge.

11 IV. Conclusion

12 Defendants have failed to provide any evidence showing that a new trial is warranted
 13 pursuant to Fed. R. Crim. P. 33(a).

14 Accordingly, **IT IS HEREBY ORDERED THAT** Defendants Michael Wayne Yost,
 15 Charles Gensemer, James Milton Wallis, Robert Young, and Kenneth Russell Krum's Amended
 16 Motion for New Trial (#1355) is **DENIED**.

17 DATED this 15th day of February 2012.



19
 20

Kent J. Dawson
 21 United States District Judge
 22
 23
 24
 25
 26

² Document #AW30250000397 is an FBI 302 form that documents the FBI's receipt of the letter and sets forth its contents.